LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 17 1956
JOHN T. FEY, Clerk

9 + 10

Nos. ~~131 and 133~~

In the Supreme Court of the United States

OCTOBER TERM, 1956

WILLIAM GIGLIO, FRANK LIVORSI, AND HOWARD LAWN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	4
Argument	14
Conclusion	30

CITATIONS

Cases:

Carrado v. *United States*, 210 F. 2d 712, certiorari denied, 347 U. S. 1018	19
Clay v. *United States*, 218 F. 2d 483	28
Costello v. *United States*, 350 U. S. 359	16, 17
Hirabayashi v. *United States*, 320 U. S. 81	26, 27
Holt v. *United States*, 218 U. S. 245	16, 17
Johnson v. *United States*, 318 U. S. 189	24
Nardone v. *United States*, 308 U. S. 338	15, 17, 19
Pinkerton v. *United States*, 328 U. S. 640	26
Rogers v. *United States*, 340 U. S. 367	24
Spies v. *United States*, 317 U. S. 492	26
Steele v. *United States*, 222 F. 2d 628	29
United States v. *Bardin*, 224 F. 2d 255, certiorari denied, 350 U. S. 883	27
United States v. *Giglio*, 16 F. R. D. 268	10, 17, 19
United States v. *Giglio*, 232 F. 2d 589	5
United States v. *Lawn*, 115 F. Supp. 674	9
United States v. *Monia*, 317 U. S. 424	24
United States v. *Murdock*, 284 U. S. 141	24
United States v. *Roth*, 208 F. 2d 467	1, 10
United States v. *Shotwell Mfg. Co.*, 225 F. 2d 394	10

Statutes:

Internal Revenue Code of 1939:	
Sec. 145 (a)	5, 28
Sec. 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b))	3, 4, 27, 28
Sec. 3793 (b) (1) (26 U. S. C. 1952 ed., Sec. 3793 (b) (1))	3, 4
18 U. S. C., Sec. 371	4

In the Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 131 and 133

WILLIAM GIGLIO, FRANK LIVORSI, AND HOWARD LAWN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 32–42; Pet. L. 22–33) [1] is reported at 232 F. 2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1956 (Pet. 43, R. 123a),[2] and petitions for

---

[1] The petition filed on behalf of Giglio and Livorsi (No. 133) is designated "Pet."; that filed on behalf of Lawn (No. 131), "Pet. L.".

[2] The printed record consists of three volumes of petitioners' appendix, one volume of the Government's appendix, and one volume of an appendix filed by the Government in the case of *United States* v. *Roth, et al.*, 208 F. 2d 467. References to the latter volume are designated (as in Lawn's petition) "A". References to the other four volumes are designated "R".

rehearing were denied on May 8 and May 10, 1956 (R. 149a, 153a). The petitions for writs of certiorari were filed on June 4 and June 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioners' request, in conjunction with their motion to dismiss the indictment, for a pre-trial hearing and inspection of the grand jury minutes to determine whether the Government had used illegally obtained evidence in obtaining the indictment.

2. Whether the district court denied petitioners sufficient opportunity at the trial to cross-examine certain witnesses concerning possible use at the trial of illegally obtained evidence.

3. Whether reversible error was committed by the admission into evidence at the trial, without objection, of "tainted" copies of certain illegally obtained documents, when "untainted" copies could have been substituted by the Government if an objection had been made.

4. Whether the evidence was sufficient to support the verdict against Livorsi on Counts 6, 8, and 9 of the indictment.

5. Whether the evidence was sufficient to support the verdict against Lawn.

6. Whether the prosecutor committed reversible error in his summation to the jury.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * *

(b) *Fraudulent returns, affidavits, and claims*

(1) *Assistance in preparation or presentation.* Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000,

or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3793.)

18 U. S. C.:

SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

On July 23, 1953, in the United States District Court for the Southern District of New York, a ten-count indictment was filed against the petitioners (William Giglio, Frank Livorsi, and Howard Lawn), charging violations of Sections 145 (b) and 3793 (b) of the Internal Revenue Code of 1939, and of the general conspiracy statute, 18 U. S. C. 371. The conspiracy count (Count 10) charged that petitioners, Roth (an accountant), and American Brands Corporation conspired to commit offenses against the revenue, including wilful attempts to evade and defeat the assessment and payment of the income taxes of three corporations. In other counts, petitioners and

Roth were charged with wilful attempted evasion of the assessment and payment of individual and corporation income taxes, and Giglio and Roth were charged with aiding and assisting in the preparation and presentation of a false 1946 income tax return for American Brands Corporation and false returns of income for fiscal years ended in 1946 of two Giglio-Livorsi partnerships known as Eatsum Food Products Company and Tavern Fruit Juice Company. (R. 1, 10–21.)

Roth pleaded guilty to nine counts of the indictment and testified for the Government in the course of a six-weeks jury trial. All three petitioners were convicted as charged. None testified in his own defense. Giglio was sentenced to five years on each of eight counts, some concurrent and consecutive, for a total of fifteen years. Livorsi was sentenced to five years on each of four counts, one to run concurrently, for a total of fifteen years. Lawn was sentenced to a year and a day on each of three counts, the sentences to run concurrently. In an opinion by Chief Judge Clark, the Court of Appeals unanimously affirmed. (Pet. 32–42; Pet. L. 22–33; *United States* v. *Giglio*, 232 F. 2d 589.)

Pre-trial Proceedings

On September 14, 1950, three informations were filed in the Southern District of New York charging that petitioners and Roth had wilfully caused American Brands Corporation to fail to pay its 1946 income taxes, and that petitioners Giglio and Livorsi had wilfully failed to pay their 1946 individual income taxes, in violation of Section 145 (a) of the Internal Revenue Code of 1939. (A. 1a, 4a, 10a, 51a–53a.) On

July 7, 1952, there was served upon Roth, through his attorney, a subponea *duces tecum* ordering him to appear before the grand jury on July 14 to testify and to produce all the books and records of nine corporations and three partnerships comprising the Giglio-Livorsi interests. (A. 54a–56a.) On July 8, 1952, similar subponeas were served upon all of the petitioners, through their attorneys, returnable July 15. (A. 57a–59a.)

All four appeared in response to the subpoenas. Roth testified that he did not have any of the books and records called for and had not seen them for several years. (A. 60a–66a.) Livorsi testified that he had never seen any of the books and records of any of the enterprises. (A. 68a–70a.) Lawn, an attorney, produced three canceled checks paid to him by the Tavern Fruit Juice Co., a Giglio-Livorsi partnership, plus a stub relating to one of the checks. He testified that these were the only records in his possession; that he had never even seen any of the other records except that at the time of incorporation he had seen some of the minute books and stock transfer books; that he had obtained the three canceled checks and the check stub from Giglio about ten weeks earlier; and that he would like to retain the originals but would "be glad to" furnish photostat copies. (A. 71a–78a.) None of these witnesses—Roth, Livorsi, and Lawn—was warned as to his privilege against self-incrimination, and none ever claimed it.

Giglio testified that he had not brought any of the requested records with him "only because I have not had sufficient time to look for them and gather them together" and would be "very happy to bring them

in" if granted a little more time. (A. 79a.) He stated that "practically all of these companies and corporations turned over their books and records to the Internal Revenue Department on some date in 1949" (A. 80a); that he would like to have 30 days in which to locate the records remaining in his custody and would bring in everything that he could find because he had nothing to hide (A. 81a–82a); that he had not seen some of the books and records since 1947 or 1948 when some of the companies went into receivership (A. 82a–89a); and that while he intended to produce them all before the grand jury he "would like to make photostats of those things that [his] accountants and attorneys think they will need to defend" him with respect to the criminal informations filed against him in 1950 (A. 91a). When asked to state where the books and records were stored after they were removed from the home office of the companies, Giglio three times refused to answer, claiming his "constitutional privilege." (A. 91a–92a.)

The Government attorney, Gerome Leone, then limited his questions to the location of the books and records of the American Brands Corporation. Giglio persisted in invoking his privilege and, at his request, was excused from the grand jury room in order that he might confer with his attorney. (A. 92a–93a.) When he returned, he continued to assert privilege with respect to the corporate books and records, repeating however that if given time he would produce everything that he could find. (A. 93a–94a.) After again being excused to confer with his attorney, Giglio refused to answer questions relating to the location of

the records of six of the corporations on the ground that to do so would tend to incriminate or degrade him. (A. 95a–96a.)

Giglio was then taken before Judge T. Hoyt Davis, who directed him to answer the questions. (A. 102a–105a.) Upon returning to the grand jury room, Giglio named five locations where the corporate books and records might be stored. (A. 108a–110a.) Leone advised him that it was the grand jury's wish that he produce the material in the New York area the next morning and the material in the Chicago area one week later. (A. 111a–113a.) During the following weeks, Giglio produced eighty cardboard cartons of records, including some partnership records. (A. 114a–119a.)

On September 2, 1952, Giglio again appeared before the grand jury and, when asked whether he had produced all the books and records of the American Brands Corporation, he explained that he had retained some of them in reliance on his constitutional rights and that his attorney had just filed a motion to quash the subpoena in part. (A. 120a–124a.) After conferring with his attorney, the witness again admitted that he possessed certain records of the American Brands Corporation but refused on constitutional grounds to describe them. (A. 125a–126a.) Leone advised him to consult with his attorney and produce all corporate and partnership records the following day. (A. 126a–127a.)

The next day Giglio refused to produce the remaining records of the American Brands Corporation and was taken before Judge Weinfeld, who directed him to produce them. (A. 128a–144a.) On September 4,

Giglio complied with this order and also produced the "minute book of American Agar Corporation which was not required but I guess it can stay here." (A. 146a–147a.) Leone then requested him to produce the books of four other corporations still in his possession, and on the following day he produced sixteen such books. (A. 148a–152a.) He stated that, pursuant to an agreement between his attorney and Leone, he still retained certain records called for by the subpoena which "would be personal and so forth" but that "You now have all the corporations you are asking for here." (A. 156a.)

On September 15, 1952, Judge Ryan quashed the subpoena as to the books and records of the three partnerships except as to those "he may have already produced." (A. 158a–159a.)

On October 20, 1952, six indictments were returned against petitioners and Roth, charging them with substantially the same offenses later recited in the 1953 indictment (*supra*, pp. 4–5). On March 27, 1953, Judge Goddard (A. 160a–167a) dismissed the six indictments on the grounds that (1) it was a violation of petitioners' privilege against self-incrimination to compel them to take the stand in the grand jury proceedings since they had already been named as defendants in the pending 1950 criminal information, and (2) it was a violation of Giglio's privilege to compel him to produce partnership records. *United States* v. *Lawn*, 115 F. Supp. 674. The decision directed the Government to return the "partnership and personal records" produced by them in response to the subpoenas. An appeal by the Government was dismissed as not timely filed. *United States* v. *Roth*, 208 F. 2d 467 (C. A. 2d).

dismissed as not timely filed. *United States* v. *Roth*, 208 F. 2d 467 (C. A. 2d).

After the present indictment was returned in July, 1953, petitioners moved to dismiss and to suppress evidence. In this connection, they requested inspection of the 1953 grand jury minutes and a hearing to ascertain whether any of the "tainted" evidence was used directly or indirectly to obtain the new indictment. (R. 26–27.) These motions were denied by Judge Palmieri. (R. 179–185.) *United States* v. *Giglio*, 16 F. R. D. 268. Similar motions were later denied at the trial by Judge Walsh. (R. 247, 2505.)

Evidence of Petitioners' Guilt

Petitioners Giglio and Livorsi were the beneficial owners of the corporations and partnerships here involved, except that petitioner Lawn owned a substantial interest in American Agar Corporation and an enterprise known as Lawn International, Inc. (Ex. 88; R. 84a–85a, 1112–1113, 1134.) Although Livorsi's name rarely appears as stockholder or officer of record (Ex. 88; R. 84a–85a, 1911–1913, 1915) and the companies were generally called "Giglio companies", he was a 50% partner with Giglio in all the enterprises (R. 1074, 1187, 1543).[3] Lawn had been associ-

[3] David G. Lubben was originally a partner in Eatsum Food Products Company but severed his connection with it early in 1946 when he learned that fraudulent accounting devices were being instituted. (R. 294–296, 356–370.) Lubben was a key Government witness in this case (together with Roth), just as he was in *United States* v. *Shotwell Manufacturing Co., et al.*, 225 F. 2d 394 (C. A. 7th), now pending on the Government's petition for certiorari (No. 9, this Term). During Lubben's cross-examination, references were made to his role in the *Shotwell* case. (R. 547–564.)

ated with a New Jersey law firm and, just before joining Giglio and Livorsi, had been Chief Assistant United States Attorney in charge of the Criminal Division for the District of New Jersey. (R. 53a, 947, 2052.) He held executive positions in some of the companies and received substantial income from them, none of which was subjected to withheld income taxes. (Ex. 88, R. 1112–1113, 1154, 1183, 1915–1924.) It appears that Lawn's principal value lay in his alleged contacts in the United States Attorney's Offices in New York and New Jersey, and the Department of Justice in Washington. (R. 329, 1075, 1218–1219, 1237–1239.)

The Court of Appeals summarized the evidence of petitioners' guilt, in part, as follows (R. 112a–117a; 232 F. 2d at 591–593):

> The conspiracy here disclosed involved attempts by a variety of means to evade assessment and payment of federal income taxes on large amounts of income earned in the World War II black market in sugar. The individual and corporate taxes evaded for the calendar year 1946 alone amounted to more than $800,000.
>
> * * *
>
> * * * * *
>
> Of the two partnerships, during the first nine months of operation Eatsum alone earned almost three quarters of a million dollars. In order further to reduce taxes the conspirators set up a series of corporations, each bearing in some combination the name "American". The purpose of the corporations was to drain off the profits of Eatsum through the use of fraud-

ulent invoices. The corporations were then to be dissolved before taxes fell due, and no income would be reported. The important corporations themselves were financially successful. So, in order again fraudulently to minimize taxes, Giglio and Roth procured the filing in the name of American Brands Corporation of a consolidated return covering the associated corporations, even though they knew that the parent-subsidiary relationship required by statute did not exist.

As thus indicated, appellants rarely resorted to an actual failure to report income. Roth's testimony, however, disclosed one illuminating instance in which such a failure apparently did take place. Part of the Eatsum operation involved the purchase and sale of corn and corn syrup, with black market price overages being paid and received in cash passing through a cash box kept in the Eatsum office. Over $400,000 in cash passed through the cash box in the course of the corn syrup operations, resulting in a profit to Eatsum of about $140,000. Apart from an item of $50,000 of "Other Income" entered on both Livorsi's and Giglio's return, the cash box profit was not reported.

* * * * *

The *admitted* tax liability for the year 1946 of Giglio, Livorsi, and American Brands Corporation according to their filed returns was $573,683.73. The total tax paid was $16,735.95. This astronomic discrepancy (which is exclusive of falsification of the returns themselves), when viewed in connection with the activities outlined above, demonstrates why there was

> no reasonable doubt of the guilt of these conspirators. * * *
>
> * * * * * *
>
> Against this background so conclusively establishing the guilt of these appellants, numerous assignments of error are for the most part insubstantial and in no event present difficulty. [Emphasis in original.]

Sugar ration controls were lifted early in 1947, marking the end of petitioners' profitable black-market sugar operations. (R. 1530, 2308–2310.) Petitioners knew that as soon as their admitted tax liability became known to the Government steps would be taken to collect. (R. 1004–1005, 1220–1221, 1473–1474.) It was decided to conceal this liability as long as possible, thus affording time for the concealment of assets. The specific illegal steps taken mainly to obtain time included the filing of late returns (R. 1004–1008); the failure to withhold taxes (R. 1183, 1923); the filing of false personal estimated tax returns (R. 86a, 1040–1041, 1077–1079); the filing of false tentative corporate tax returns (R. 86a, 1119); the filing of returns in the wrong district (Ex. NNN 63, R. 1076); and the filing of false returns on behalf of third persons (who could not possibly pay the tax) for the purpose of improperly attributing Giglio-Livorsi partnership income to them (R. 351–352, 389–390, 1093–1095, 1180).

All of the tax returns were filed on or about September 15, 1947. At about that time, a series of transactions took place resulting in the conversion of all

physical assets into currency. These transactions, arranged in part by Lawn, were the sale of Livorsi's estate (Exs. 50–51, 159, 164–167, 169–171, R. 960–963, 2051–2073); the sale of Giglio's estate (Exs. 53–55, 97–102, 105, 161–163, R. 977–978, 1219–1234, 1245–1247); the sale of the home office of the enterprises (R. 1192–1193); the conversion and diversion of corporate assets (Ex. 88, R. 1916–1923); and the concealment of corporate loans to the individuals (Ex. 79A14, R. 1126–1133, 1143, 1175–1180, 1294, 1531–1536).

The final steps in the conspiracy consisted of attempts to suppress evidence and the fabrication of a defense that petitioners and their companies had honestly gone broke and simply were unable to pay their taxes. These steps included the deliberate destruction of records belonging to their accountants (R. 1099–1102, 1698–1701, 1744–1749); the threatening of witnesses (R. 375, 377, 1065–1067, 1701); subornation of perjury (R. 664–668, 1288–1292, 1294–1295, 1324–1326, 1532–1536); and the attempted use of improper influence with Government officials (R. 329, 374–375, 1065–1066, 1074–1076, 1135, 1217–1219, 1237–1239).

ARGUMENT

1. Petitioners contend (Pet. 7–13, 16–18, Pet. L. 12–13) that the district court erred in denying their request, in conjunction with their motion to dismiss the indictment (R. 179–185), for a pre-trial hearing and inspection of the grand jury minutes. In this connection, they rely on Judge Goddard's decision (*supra*, p. 9) dismissing the 1952 indictments on the ground that petitioners' privilege against self-incrimi-

nation had been violated in the course of the 1952 grand jury proceedings. Pointing out the similarity of the present (1953) indictment and the 1952 indictments, petitioners urge that Judge Goddard's decision was sufficient, under the doctrine of *Nardone* v. *United States*, 308 U. S. 338, to entitle them to a full opportunity to "determine whether or not the government had employed any of the tainted evidence, or leads and clues obtained therefrom, in obtaining the present indictment" (Pet. 6).

The answer to this contention is twofold: (a) the *Nardone* doctrine is inapplicable to the evidence used in grand jury proceedings (as distinguished from evidence used at a trial); and (b) petitioners, in any event, failed to make the preliminary showing required by *Nardone*. For purposes of this discussion, it will be assumed that the rule of the *Nardone* case, which involved illegally obtained wire-tapping evidence, also applies to evidence obtained in violation of the privilege against self-incrimination. We will also assume that Judge Goddard's decision, insofar as it involved certain issues relating to the 1952 grand jury proceedings, is binding here, even though the Government has certainly never acquiesced in it and even though its very foundation seems in substantial doubt.[4]

---

[4] As pointed out *supra*, pp. 9-10, an appeal by the Government was dismissed as not timely filed.

In dismissing the 1952 indictments, Judge Goddard ruled (a) that it was a violation of petitioners' rights under the Fifth Amendment to compel them to take the stand in a related grand jury proceeding since petitioners had been named as defendants in the 1950 informations, and (b) that it was a violation of Giglio's rights to compel him to produce partnership records despite his claim of privilege (A. 165a-166a). We think the

(a) Through the proposed hearing and inspection of the grand jury minutes, petitioners sought to establish the invalidity of the 1953 indictment. However, the *Nardone* rule, neither in its terms nor in the policy underlying it, has application to evidence presented in grand jury proceedings; it relates instead to the kind of evidence used at a trial.

The distinction, based on the fact that an indictment is only a preliminary step prior to a trial, is a vital one. Only recently, in *Costello* v. *United States*, 350 U. S. 359, this Court sustained the validity of an indictment allegedly based solely on hearsay evidence. Following *Holt* v. *United States*, 218 U. S. 245, the Court pointed out that "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competence and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment.". 350 U S. at 363. The same is true where, as here, the so-called incompetent evidence was allegedly obtained in violation of the accused's privilege against self-incrimination. See also *Holt* v. *United States*,

court was mistaken on the law as to the first ground and mistaken on the facts as to the second. In any event, even assuming *arguendo* that both grounds were correct, it would appear that the jurisdictional basis of Judge Goddard's decision was swept away by this Court's decision in *Costello* v. *United States*, 350 U. S. 359, holding that the alleged incompetency of evidence used in grand jury proceedings affords no ground for seeking a dismissal of an indictment returned by the grand jury. See also *Holt* v. *United States*, 218 U. S. 245, and text discussion above, pp. 16–17.

supra.[5] As this Court added in the *Costello* case, 350 U. S. at 364, "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." This rationale is particularly appropriate here, since in this case, to a greater degree perhaps than in *Costello* and *Holt*, there can be no doubt of the trustworthiness of the challenged evidence.

(b) In any event, under the *Nardone* decision (308 U. S. at 342), "claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury." Both courts below held that petitioners failed to meet this burden. No further review of this essentially factual issue is warranted.

In opposition to petitioners' motion to dismiss the indictment, the Government filed what the district court regarded as "affidavits of considerable weight * * *." 16 F. R. D. at 270. These affidavits were received "from all the revenue agents who have been responsible for the investigation leading to the indictment of the defendants and from all the United States Attorneys who have been responsible for the prosecution of this case." Judge Palmieri summarized the affidavits as follows (*ibid.*):

---

[5] In the *Holt* case, the "incompetent" evidence consisted of allegedly coerced admissions of the accused. In upholding the indictment, the Court stated that "The abuses of criminal practice would be enhanced if indictments could be upset on such a ground." (218 U. S. at 248.)

> These affidavits show that the activities of the defendants have been under investigation since 1948 and that three revenue agents spent a substantial period of time on this investigation before defendants appeared before the grand jury that returned the prior indictments in 1952. The affidavits show that long before 1952 the Government had in its possession copies of bank checks, bank statements, books and other records pertaining to the defendants' activities which had been secured from banks, third persons, a New Jersey Equity receiver, government agencies, and material abandoned by the defendants; * * * The affiants also state that the revenue agent referred to this material as the basis for his computations, that the illegally obtained material was largely irrelevant, deliberately shuffled and contained no new evidence or leads thereto. The Government affiants admit that the tainted material contained corroboration of evidence that the government had previously acquired but state that this corroborative evidence was in no way used in obtaining the present indictment.

On the basis of these affidavits and the affidavits presented by the defendants, Judge Palmieri concluded (*ibid.*) that the "defendants' claim does not have the 'solidity' required to justify holding a hearing," that there was "no basis for exercising [his] discretion to grant a hearing or inspection of grand jury minutes," and that there was "no room for an inference that the Government used illegally obtained material in securing the present indictment."

In affirming, the court below found no abuse of discretion in Judge Palmieri's ruling. As it pointed

out, "The mere fact that Judge Goddard dismissed the 1952 indictment because of the use of allegedly illegal evidence did not create a requirement as a matter of law for cross-examination of government witnesses and examination of documents and grand jury minutes; and particularly is this so in the face of the strong adverse showing made by the affidavits of the prosecution." (Pet. 39.) The court was also impressed with the "massive evidence" obtained by the Government both prior and subsequent to the 1952 grand jury proceedings. (Pet. 40.)

Considering all the unique circumstances of this case, even assuming *arguendo* that the *Nardone* rule is applicable to evidence used in grand jury proceedings, we do not think further review is required of the affirmance by the court below of the trial court's exercise of discretion in denying the requested pretrial inquiry. Cf. *Carrado* v. *United States*, 210 F. 2d 712, 717–718 (C. A. D. C.), certiorari denied, 347 U. S. 1018.

2. Petitioners also complain (Pet. 14–16) that the district court denied them an adequate opportunity to cross-examine certain witnesses concerning the possible use at the trial (as distinguished from the grand jury proceedings) of the allegedly tainted evidence.

In rejecting this contention, the Court of Appeals stated (Pet. 40):

> * * * it is clear that appellants had a right of full cross-examination during the trial as to the sources of government exhibits and that they exercised this right on a number of occasions. On defendants' motion to dismiss at

> the conclusion of the government's case, Judge Walsh found nothing in the record of trial suggesting any use of illegal clues. We see no basis for contravening this finding.

The record supports this conclusion and refutes the argument of petitioners. The trial judge was alerted to the problem from the first day of trial (R. 2a–8a, 285, 2745) and was vigilant to see that no tainted evidence crept into the record (R. 1957–1959, 1962–1963, 1979, 2036, 2075–2088). Direct and cross-examination relating to the source of the Government's evidence was conducted throughout the trial. (R. 346, 379–381, 412, 1153, 1628–1634, 1648, 1652, 1657–1658, 1662, 1719–1720, 1732–1733, 1738–1740, 1744–1745, 1751–1752, 1758, 1832, 1928–1956, 2030–2032, 2034–2037, 2044–2048.) Petitioners were never prevented from examining when their purpose was to ascertain the source of evidence offered at the trial (as distinguished from that used before the grand jury); nor did they ever object to the introduction of any evidence on the ground that it was tainted. Near the end of the Government's case, the court requested both sides to submit memoranda on the subject of whether any improperly obtained evidence may have been used at the trial. The Government submitted such a memorandum but petitioners did not. (R. 1957–1959, 1962–1963, 1979, 2036, 2076.)

In support of their contention, petitioners cite (Pet. 15) three instances where they were allegedly barred from cross-examining as to the use at the trial of the so-called tainted evidence. An examination of the record, however, shows that each of the three in-

stances relates, not to the use of any tainted evidence in the trial, but rather in the 1952 or 1953 grand jury proceedings. Thus, in the first instance cited by petitioners (R. 1344–1356), petitioners' counsel stated (R. 1347):

> I really don't see how I can get adjudicated *the question of the illegality of the indictment* before you without calling all these people who made affidavits before Judge Palmieri. [Emphasis added.]

The following colloquy then occurred:

> Mr. STRYKER. Have I made it plain?
>
> The COURT. I think you have, but I want to be sure. Now the whole purpose of this is to go to the procedural validity of the indictment.
>
> Mr. STRYKER. That is it, yes, sir. That is it, that is just it exactly.
>
> The COURT. And it is a question, really, of what happened before the grand jury.
>
> Mr. STRYKER. That's it, really, just that.

The other two instances cited by petitioners are to like effect (R. 1944–1945, 2133–2137).[6] On all three

---

[6] Indeed, with respect to the third instance cited by petitioners, it appears that the purpose of petitioners' counsel in making the inquiry as to the grand-jury proceedings was merely to show the jury that the prosecution was guilty of "bad faith." Counsel had announced in his opening statement, while referring at length to the 1952 grand jury proceedings (R. 35a–40a), that "it is a fundamental part of my defense that this whole lawsuit, this action, is founded in bad faith" (R. 36a). Later, counsel sought to question witness Leone (see note 7, *infra*) concerning the issuance of subpoenas duces tecum in connection with the 1953 grand jury proceedings. Counsel unsuccessfully sought to justify such questioning on the ground that "I have opened to this jury telling the history of this case and I don't want to be told later on that I haven't done my best to substantiate what I have told

occasions, the trial court ruled that the alleged use of the so-called tainted evidence in procuring the indictment was no longer material in the light of Judge Palmieri's pre-trial ruling on the same issue. None of these rulings lends any support to petitioners' contention that they were denied an opportunity to cross-examine witnesses concerning the use of any so-called tainted evidence at the trial.[7]

3. Petitioners Giglio and Lawn contend that their convictions should be reversed on the ground that the Government made use at the trial of evidence procured in the 1952 grand jury proceedings in violation of their privilege against self-incrimination. Giglio's

---

them." (R. 2134.) He also stated: "I have said to this jury, in the opening, that this case was founded in bad faith, bad faith * * *. Well, I don't want it to be said that I made a statement about the history of this case, which I made in all good faith, and I believe a very accurate one, without the opportunity to substantiate what I said * * *. As to the correctness of Judge Goddard's ruling or anything else, that certainly isn't before the jury, but what the Government did, what the prosecutors did in violating the rights of these defendants, as bearing on the whole nature of this prosecution, I submit has the highest relevancy." (R. 2134–2137.)

[7] Moreover, one of the three witnesses (Present, a Government revenue agent) was cross-examined at great length on this issue. (R. 1928–1956, 2030–2032, 2034–2037, 2044–2048.) As for the other two witnesses (Roth, petitioners' accountant, and Leone, the Assistant United States Attorney who had presented the Government's case to the 1952 grand jury), it is doubtful if either could give any information on the use of tainted evidence at the trial. Roth, according to Lawn's petition (Pet. L. 11), "had no part in the procurement by the Government of the unconstitutional evidence and was not in a position to give testimony as to the source of the papers on which he was being questioned." Leone resigned from Government service in 1953 (R. 102) and the trial did not begin until January, 1955 (R. 236).

sole contention on this score (Pet. 11), that he was "forced to admit the sale of his home in Locust, N. J." and that this admission may have furnished the prosecution with a lead, is patently frivolous.[8] Lawn's argument (Pet. L. 9–12) is that Government Exhibits 61–A and 61–B[9] (consisting of photostatic copies of a $15,000 check paid to him by the Tavern Fruit Juice Company in 1945 and the corresponding page from the partnership's check stub book) were introduced into evidence at the trial even though the orig-

[8] The grand jury testimony complained of was elicited while Giglio was being questioned as to the location of corporate books and records (A. 110a). The following colloquy occurred:

"Q. When were these records removed from 19 Rector Street, Mr. Giglio?

"A. I honestly couldn't tell you.

"Q. Were they removed at your direction?

"A. Probably.

"Q. Well, isn't it a fact that they were removed at your direction?

"A. Very probably I ordered them removed, yes. Indeed, there is one more place that you might find some records. *I owned, at one time, a home down in Shrewsbury, New Jersey, in Locust, New Jersey*, and in a barn there I had some filing cabinets, and so forth. There might be some around there yet.

"Q. Well, you sold those premises, did you not?

"A. Yes, I know; but I sold it to a man who permitted me to keep some space there for storage." [Emphasis added.]

It is obvious that Giglio volunteered the information and that the Government was already well aware of it.

[9] It appears that Judge Goddard's order was stayed pending the Government's appeal (*supra*, pp. 9–10). The partnership records were impounded. Later the Government offered to return them to petitioners but they rejected the offer. (R. 31, 39, 184.) Judge Palmieri then ordered their return in 1954. (R. 31, 39, 184.) The record does not show how the Government happened to retain possession of photostatic copies of these two exhibits, though they were apparently made originally at the suggestion of Lawn. (A. 76a–77a.)

inals were within the terms of Judge Goddard's suppression order. (A. 170a.) The contention is without merit.

(a) Lawn produced the original check and check stub before the grand jury in 1952 without claiming any privilege whatever. (A. 71a–77a.) He thereby waived any claim of privilege he might have had with respect to them. *Rogers* v. *United States,* 340 U. S. 367, 370; *United States* v. *Morvia,* 317 U. S. 424, 427; *United States* v. *Murdock,* 284 U. S. 141, 148. Moreover, it seems clear that he was well acquainted with his constitutional rights, not only because the subpoena was served upon him through his attorney but because Lawn himself had formerly been Chief Assistant United States Attorney in charge of the Criminal Division at Newark, New Jersey. (R. 53a, 2573.)

(b) Assuming, *arguendo,* that Lawn did not waive his privilege when he produced the check and stub before the grand jury, he certainly waived it when he permitted copies of the check and stub to go into evidence at the trial. Defense counsel examined the photostats, cross-examined as to them, and then stated "No objection." (R. 1022.) The point was never called to the trial court's attention, and petitioner is plainly in no position to rely upon it now. Cf. *Johnson* v. *United States,* 318 U. S. 189, 200–201.[10] As the

[10] We disagree with the statement (Pet. L. 11) that the "identifying marks on the inner sides of the photostatic exhibits were hidden from view because the inner sides had been stapled or folded." The photostats (Exs. 61–A and 61–B) have never been folded, nor were they stapled in such a way as to conceal the 1952 grand jury's identification markings. On the canceled check itself (Ex. 61–A), the notation "G. J. Ex. 2, 7/15/52, L. F. G." appears directly below petitioner's endorsement.

Court of Appeals pointed out, had such an objection been made, "untainted" copies, obtained long before the 1952 grand jury proceedings, could have been substituted for the "tainted" copies. (Pet. 41.)

4. Livorsi argues (Pet. 20–30) that the evidence is insufficient to support his conviction on charges of (a) attempting to evade and defeat his 1946 individual income taxes (Count 6), (b) attempting to evade and defeat the *payment* of his 1946 individual income taxes by concealing his assets (Count 8), and (c) attempting to evade and defeat the *payment* of the 1946 income tax of American Brands Corporation by diverting corporate assets to his own use (Count 9).[11]

(a) The argument with respect to Count 6 (R. 14) is based on the court's instruction to the jury to "disregard any income they may have received from Eatsum" with respect to that count (R. 2731). Livorsi contends (Pet. 20–24) that since his unreported income from sources other than Eatsum was only $61,216.55 (Ex. 4; R. 81a) and since he reported $101,123.88 from Eatsum there is no proof of unreported income. He construes the instruction as telling the jury that it must eliminate from its calculation of his true income the entire $228,288.58 which the Government claimed he should have reported from Eatsum (R. 81a) but at the same time it must give him credit for the $101,123.88 he reported from that

[11] The sufficiency of the evidence against Livorsi on the conspiracy count (Count 10) is unchallenged. The sufficiency of the evidence as to Giglio is unchallenged as to any count.

source. We submit that the instruction is not reasonably susceptible to any such interpretation.

(b) Livorsi urges (Pet. 25–27) with respect to Count 8 (R. 15) that there was no proof that he committed any affirmative act of concealing his assets in the Southern District of New York and therefore the court has no jurisdiction of the offense. As petitioner points out, the evidence showed that when he sold his estate on September 16, 1947 (the day after all the tax returns in question were filed), he received a check for $64,335.49 at his home (in the Eastern District of New York) and that he took it to New Jersey, where he cashed it and stuffed the money into his trousers pocket. (R. 2058–2072.) We think the evidence showed other acts of concealment which sufficiently establish the offense charged. For example, during the six months which intervened between the due date of the returns and the date on which they were filed, petitioner withdrew $30,058.33 from the "American" corporations in the Southern District of New York. No income tax was withheld on any of this money, which disappeared from view after being received by petitioner. (R. 1920–1923.) None of it was ever applied to his 1946 income tax, which was already overdue when the withdrawals were made. (R. 86a.) [12]

[12] It should be noted that the sentences received by Livorsi on Counts 6 and 8 are to run concurrently with each other. (R. 2741.) If there be any error with respect to either count, the sentence would still be good. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642.

The argument (Pet. 27) that "Prosecution for tax evasion by concealing assets rests upon a dictum of this Court in *Spies* v.

(c) With respect to Count 9 (R. 15–16), it was shown that as of December 2, 1947, petitioner owed the "American" corporations $34,558.33 which appeared on their books as "Loans Receivable" (R. 1128). Petitioner argues that the evidence did not establish that he had fraudulently diverted corporate assets to his own use because the $57,058.33 he withdrew during the calendar year 1947 (R. 1917) was about the same amount that he had withdrawn in 1946 (Pet. 28–30). Aside from petitioner's dubious conclusion that there was nothing fraudulent about his 1946 withdrawals, the obvious fallacy in the argument is the fact that by the beginning of 1947 petitioner knew he had enormous personal and corporate income tax obligations, some of which were past due (on estimated returns) and all of which would be due by March 15, 1947. (R. 86a.)

5. Lawn contends (Pet. L. 15–18) that the evidence was insufficient to establish his guilt on any of the three counts (Nos. 7, 9 and 10–R. 14–21) on which he was convicted. Since his sentence of a year and a day did not exceed that which could have been imposed on the conspiracy count alone, it is unnecessary to consider the evidence relating to the other counts. *Hirabayashi* v. *United States, supra.*[13] Lawn held executive positions

---

United States, 317 U. S. 492, 499, arises from a confusion between the crime of wilfully attempting to evade and defeat the tax (which is usually committed by filing a false return) and wilfully attempting to evade and defeat the *payment* of tax, both of which are proscribed by Section 145 (b) of the Internal Revenue Code of 1939. See *United States* v. *Bardin*, 224 F. 2d 255 (C. A. 7th), certiorari denied, 350 U. S. 883.

[13] For the same reason it is unnecessary to consider Lawn's contention (Pet. L. 13–15) that Counts 7 and 9 charged no more than

in many of the companies here involved and received substantial income from them. (Ex. 88, Ex. 58A, R. 84a–85a, 1023, 1134, 1203, 1911–1912, 1915–1916). His office was next door to Giglio's at the company headquarters. (R. 326–327.) There was ample evidence tending to show Lawn's knowledge of the legal, financial, and tax problems of the enterprises. (R. 883, 989, 1006, 1122–1123, 1135, 1144–1145, 1175–1176, 2154–2155.) He was present when some of the important steps in the tax evasion conspiracy were being planned. (R. 367–368, 1220–1221, 1532.) His principal value to the conspiracy lay in his alleged close connections with the United States Attorneys' Offices in New York and New Jersey, and the Department of Justice in Washington. (R. 329, 1074–1075, 1217–1219, 1237–1239.) When a federal grand jury investigation of Lawn began in New Jersey, he assured Roth that his friend the United States Attorney would keep him advised as to the details of the proceedings. (R. 1074–1075.) Earlier, Lawn had persuaded T. Lamar Caudle, then Assistant Attorney General in charge of the Tax Division, Department of Justice, to dismiss the informations filed against petitioners in 1950, but the United States Attorney for the Southern District of New York refused to do so because Caudle would not put the instructions in writing. (R. 1237–1239.) When the conspiracy began to fall

---

the misdemeanor of wilfully failing to pay a tax, proscribed by Section 145 (a). We note, however, that there is no conflict between this case and *Clay* v. *United States*, 218 F. 2d 483, 485 (C. A. 5th). (See Pet. L. 14.) The indictment in that case alleged a mere act of omission, i. e., that the tax was not paid. The instant indictment alleged wilful attempts to evade and defeat the payment of taxes (R. 14–16), clear violations of Section 145 (b).

apart in mid-1953, Roth ruefully told Giglio (R. 1218–1219):

> * * * we lulled ourselves to sleep with Howard Lawn's contact with the Department of Justice in Washington, in New York and in New Jersey, in order to prevent any indictments; and gradually we are going on the road to ruin, because all that protection and contacts have fallen down.

We submit that the evidence of Lawn's participation in the conspiracy is sufficient to support the verdict against him.

6. There is no merit in the contention (Pet. L. 18–19) that the prosecutor committed reversible error in summing up the case to the jury.[14] Moreover, no objection whatever was made at the trial and the point has therefore not been preserved.

---

[14] The principal complaint is that the prosecutor should not have told the jury he vouched for Government witnesses Lubben and Roth. The defense opened the door to such a statement by devoting the bulk of its summation to a virulent attack on the credibility and character of those witnesses. (R. 2511–2533, 2535–2557, 2578–2584.) There appears to be no similarity between this case and *Steele* v. *United States*, 222 F. 2d 628, 631 (C. A. 5th), or the other cases relied on by petitioner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

SEPTEMBER, 1956.